Supreme Court, U.S.
FILED
MAY 20 1996
CLERK

No. 95-1503

In The

Supreme Court of the United States

October Term, 1995

SHERIFF RICHARD MACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE WYOMING SHERIFFS ASSOCIATION IN SUPPORT OF PETITIONER

PAUL M. SEBY*
1400 Glenarm Place, Suite 300
Denver, CO 80202
Tel. (303) 571-1400
Attorney for Amicus Curiae

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

IDENTITIES AND INTERESTS OF AMICUS CURIAE 1

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE... 2

SUMMARY OF ARGUMENT..... 2

REASONS FOR GRANTING THE WRIT 3

I. THE DECISION OF THE NINTH CIRCUIT IMPUGNS FUNDAMENTAL NOTIONS OF FEDERALISM AND STATE SOVEREIGNTY ... 3

II. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH SUPREME COURT PRECEDENT INTERPRETING THE TENTH AMENDMENT AS AN EXPRESS LIMITATION ON CONGRESSIONAL AUTHORITY..... 7

III. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH A DECISION OF THE FIFTH CIRCUIT AND REQUIRES THIS COURT'S INTERVENTION..... 13

IV. IMPORTANT SEPARATION OF POWERS QUESTIONS ARE PRESENTED BY THE PETITION 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Aptheker v. Secretar, 378 U.S. 500 (1964) 13

Bowen v. American Hospital Ass'n, 476 U.S. 610 (1986) 11

Bowsher v. Synar, 478 U.S. 714 (1986) 15

Buckley v. Valeo, 424 U.S. 1 (1976) 16

Coleman v. Thompson, 501 U.S. 722 (1991) 5

Frank v. United States, ___ F.3d ___, 1996 WL 116182 (1996) 2

Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) 10

Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264 (1981) 3, 4

Koog v. United States, ___ F.3d ___, 1996 WL 131950 (1996) 11, 13, 14

Mack v. United States, 66 F.3d 1025 (9th Cir. 1995) 2, 9, 11, 13

Marbury v. Madison, 5 U.S. 137, 1 Cranch 137 (1803) 3

Meyers v. United States, 272 U.S. 52 (1926) 15

Moore Ice Cream Co. v. Rose, 289 U.S. 373 (1933) 13

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 4

New York v. United States, 112 S.Ct. 2408 (1992).. *passim*

TABLE OF AUTHORITIES – Continued

Page

Reid v. Covert, 354 U.S. 1 (1957) 5

U.S. Term Limits, Inc. v. Thornton, ___ U.S. ___, ___, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) 4

United States v. Lopez, 115 S.Ct. 1624 (1995) 3, 4

United States v. Munoz-Florez, 495 U.S. 385 (1990) 15

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 10

STATUTES

18 U.S.C. § 922(s) ..... *passim*

Wyoming Statute § 18-3-106 8

Wyoming Statute § 18-3-111 8

Wyoming Statute § 18-3-901 8

CONSTITUTION

Article I, § 8, Cl.3 1

Article II, § 2 ..... 1, 15, 16

Tenth Amendment 1, 5, 7, 17

OTHER

H.R. Rep. No. 103-344 at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin. News at 2008 9

Supreme Court Rule 10(a) 2

Supreme Court Rule 10(c) 2

IDENTITIES AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the Wyoming Sheriffs Association ("WSA") submits this brief *amicus curiae* in support of Petitioner Sheriff Richard Mack. Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.

Amicus, WSA, is an unincorporated Wyoming association whose membership includes twenty-three elected chief law enforcement officers who serve as county sheriffs in the State of Wyoming. The WSA's President is Sheriff Byron Odekoven of Campbell County, Wyoming. The WSA is itself party to a similar challenge to Petitioner's, having filed suit against the United States in the United States District Court for the District of Wyoming (No. 95-CV-066-D) on March 27, 1995. The WSA has alleged, *inter alia*, that enactment of 18 U.S.C. § 922(s) is beyond the power delegated to Congress in Article I, § 8, Cl.3 of the United States Constitution to regulate commerce; violates the Tenth Amendment to the Constitution; and violates the Appointments Clause of Article II, § 2 of the Constitution. On August 25, 1995, the District Court heard argument on the parties' cross-motions for summary judgment. To date, the District Court has not issued a ruling.

Amicus seeks to augment the argument presented by the Petition for Writ of Certiorari. *Amicus* believes that its member sheriffs' perspective, with regard to their geographically large county areas and limited resources will provide an additional viewpoint with respect to the constitutional issues presented.

Amicus wishes to underscore the fact that Supreme Court Rules 10(a) and (c) list among the considerations governing review on *certiorari*, the circumstances when a United States Court of Appeals enters a decision in conflict with another United States Court of Appeals, or has decided a federal question in a way that conflicts with applicable decisions of this Court. *Amicus* submits that both of these grounds for review are present in this case.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amicus hereby adopts Petitioners' statement and description of other opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF ARGUMENT

A divided panel of the United States Court of Appeals for the Ninth Circuit has reversed two United States District Courts, and has upheld the constitutional validity of 18 U.S.C. § 922(s) [("Brady Act")] against a challenge brought by two county sheriffs based upon the Tenth Amendment to the United States Constitution. *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995).

Subsequently, the United States Court of Appeals for the Second Circuit held, consistent with the Ninth Circuit, that 18 U.S.C. § 922(s) is constitutional. *Frank v. United States*, ___ F.3d ___, 1996 WL 116182 (1996). One week later, the United States Court of Appeals for the

Fifth Circuit found 18 U.S.C. § 922(s) to be unconstitutional as a violation of the Tenth Amendment. *Koog v. United States*, ___ F.3d ___, 1996 WL 131950 (1996).

These cases all involve the same statutory provision that is also the subject of ongoing actions in several United States District Courts, including an action involving *Amicus* WSA in the District of Wyoming. Therefore, *Amicus* believes that this court should grant Petitioner's Petition for Writ of Certiorari to resolve the present and direct conflict between the federal circuits and give needed guidance to the U.S. District Courts.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT IMPUGNS FUNDAMENTAL NOTIONS OF FEDERALISM AND STATE SOVEREIGNTY

Amicus submits that this Court's review of the attendant Petition should rightfully begin with a consideration of "first principles." *United States v. Lopez*, 115 S.Ct. 1624 (1995). As for nearly two hundred years, this Court has held that "It is, emphatically, the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137 (1803).

The scope of Congress' power under the Commerce Clause is set forth in *Hodel v. Virginia Surface Mining & Reclamation Assoc.*: "This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." 452 U.S. 264, 276-277 (1981). Perhaps the quick conclusion

is that the foregoing defines an unlimited power, one that is unlimited both in its jurisdictional reach and in Congress' authority to set the limits of that reach. However, the constant refrain in most, if not all, of this Court's cases reviewing each new exercise of the Commerce power is that there are not only limits, but constitutionally required limits dictated by the federalist structure embodied in the Constitution. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *United States v. Lopez*, 115 S.Ct. 1624 (1995).[1]

In light of this federalist structure, the Commerce power cannot be unlimited, because it is only one of several defined and enumerated powers. *U.S. v. Lopez*, 115 S.Ct. at 1628.[2] *Amicus* submits that when an exercise

---

[1] *See, also, U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, ___, 115 S.Ct. 1842, 1972, 131 L.Ed.2d 881 (1995) (Kennedy, J., concurring) (observing that the Constitution "establish[es] two orders of government, each with its own set of mutual rights and obligations to the people who sustain it and are governed by it").

[2] [I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce. Nor is it sufficient that the person or activity reached have some nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a substantial effect on interstate commerce. Moreover, simply because Congress may conclude that a particular activity *substantially* affects interstate commerce does not necessarily make it so.

Hodel at 310-311 (Rehnquist, J., concurring) (citations omitted) (emphasis added).

of the Commerce power threatens to "obliterate the distinction between what is national and what is local," it is the duty of this Court to articulate and apply constitutional limits upon that power. Thus, while Congress' power is plenary, Congress does not possess the authority to reach beyond the boundaries established by the Constitution. The Commerce power is plenary only within its own sphere. In the words of Justice Black, "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source." *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion).

If the Framers intended to give Congress the power to operate in all spheres, it would not have been necessary to list the spheres of Congressional power in the Constitutional text. Moreover, to remove any doubts as to the intentions of the Framers in this regard, the principle was included within the Bill of Rights and expressly added to the Constitution via the Tenth Amendment. Indeed, "the Tenth Amendment and the Commerce Clause . . . are but two sides of the same coin." *Lopez, supra* at 1346. Regarding the Tenth Amendment side of the coin, "state sovereignty is not just an end in itself," *New York v. United States*, 112 S.Ct. at 2431, but "[r]ather federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

In deciding whether the limits of any enumerated power have been exceeded, this Court's precedent requires consideration of the Tenth Amendment and the principles of federalism embodied therein:

> The Tenth Amendment likewise restrains the power of Congress. . . . [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by [a limitation on an Article] power.

New York v. United States, 112 S.Ct. 2408 (1992).

Regrettably, this Court's decision in *New York*, and its discussion of the core values of federalism have been lost on the Ninth Circuit. Instead, the decision of the Ninth Circuit suggests that the challenge brought by the Petitioner involves small matters and mere quibbling in light of the undeniable juggernaut of Congressional power that has been unleashed under the Commerce Clause. However, "for want of a nail" large causes have been lost and it will not do, therefore, to dismiss considerations of small things as small things or mere quibbling when they relate to the structure of the Constitution itself. Accordingly, *amicus* WSA requests that the Court grant the Petition for Writ of Certiorari to conclusively determine whether the imposition of federally mandated affirmative duties upon local law enforcement officials violates the Tenth Amendment by impermissibly encroaching upon the sovereignty of state governments.

II. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH SUPREME COURT PRECEDENT INTERPRETING THE TENTH AMENDMENT AS AN EXPRESS LIMITATION ON CONGRESSIONAL AUTHORITY.

This Court's most recent expatiation on the Tenth Amendment and its attendant constitutional limitation on federal authority occurred in *New York v. United States*, 505 U.S. 144 (1992). *Amicus* submits that this Court's decision in *New York* is central to the question presented in the Petition. In *New York* this Court invalidated one of the provisions of the Low-Level Radioactive Waste Amendments of 1985 that ordered state governments to either take full legal title to certain wastes created by private entities (and consequently incur liability) or, alternatively, to regulate the waste according to federal mandates. This Court held:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the United States. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty'. . . . Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or *administer* a federal regulatory program.

Id., 112 S.Ct. at 2434-35 (emphasis added).

Therefore, *New York* does not represent a narrow or aberrational holding, but mandates that Congress may not

single out State officials and conscript them as its agents.[3] Like the take-title provision of the statute invalidated in *New York*, the Brady Act "offers a state government no option other than that of implementing legislation enacted by Congress." *Id.* at 177, 112 S.Ct. at 2429.

The duties imposed by 18 U.S.C. § 922(s) on all "Chief Law Enforcement Officials" ("CLEOs"), such as *amicus* WSA sheriffs, are new federally prescribed, non-discretionary tasks that are mandated without the consent or participation of the State of Wyoming. Wyoming law does not require Wyoming sheriffs to perform the duties that the Brady Act imposes on them. In the face of Congress' substantive amendment of Wyoming policy as to the proper role and duties of the CLEO, Wyoming is powerless to change this result.[4]

18 U.S.C. § 922(s) imposes enumerated Federal duties on CLEOs that are specifically defined to include those elected to State office. The omission of duties for federal officials was not unintentional as Congress rejected a proposal to have the labor undertaken by federal employees.[5] These federally mandated duties frustrate a

---

[3] This Court has made clear that the Commerce Clause only empowers the federal government to act upon individuals rather than upon the states themselves. *See New York* at 2430-31.

[4] *Amicus* WSA's sheriffs are required by law to devote full time to their state law enforcement duties or they are subject to malfeasance charges and removal from office. In addition, they are personally liable for the acts of their deputies and assistants. Wyoming Statute §§ 18-3-106, 111 and 901.

[5] Rep. Schiff described unsuccessful attempts at amendment: "My first amendment proposed to change the burden of performing the background check from state and

State's ability to have CLEOs perform state-chosen responsibilities, such as the enforcement of local laws, the maintenance of jails or the transportation of criminals. To the sheriffs of the WSA, the more "federal" duties they must perform, the fewer "state" duties they have time and resources for. *Amicus* submits that whatever the outer limits of state sovereignty may be, they surely encompass the right to set the duties of office for state-created officials and to regulate the internal affairs of those governmental bodies.

Amicus' member sheriffs' experience is that each background check requires as long as one hour to complete if it is under ordinary circumstances. The sheriffs' offices of the various Wyoming counties have processed as many as several thousand applications since the inception of the Brady Act. Notably, the number of deputies available in each Wyoming county ranges from four to thirty. There are also only one to eighteen deputies on duty at any given time who are responsible for patrolling areas ranging in size from 3,250 square miles to as large as 11,000 square miles.

The Ninth Circuit repeatedly terms such added burdens as "only minimal requirements" *Mack*, 66 F.3d at 1031. Regrettably, the Ninth Circuit's unfortunate characterization vividly underscores one significant rationale underlying federalism: Washington can be hopelessly out of touch with local conditions.

---

local law enforcement to the Federal Bureau of Investigation, which maintains the most comprehensive criminal records in the country." H.R. Rep. No. 103-344 at 38-39, *reprinted* 1993 U.S. Code, Cong. & Admin. News at 2008.

The Ninth Circuit's rationale conflicts with this Court's decision in *New York*, as *New York* recognizes no *de minimus* exception. The Constitution is, in Article VI, declared the "Supreme law of the land;" and this Court has accordingly been loath to find that a violation is a "trifle," with which "the law is not concerned."[6]

Further, logistical burdens are not the only relevant Tenth Amendment impact. In *New York*, this Court also noted that such Federal "commandeering" of state officials undermines the very core of federalism: "[I]t may be State officials who bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramification of their decision." *Id.* at 2424. Regrettably, some of *Amicus'* member sheriffs have taken the brunt of criticism from constituents who hold them blameworthy for performing the duties which Congress, insulating federal employees, demands of them rather than matters deemed of greater local concern.

The Ninth Circuit's glib attempt to reverse this Court's Tenth Amendment jurisprudence fails. In *New York*, this Court emphasized that the constitutional infirmity therein extended to forced administration.

---

[6] *See e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) ($1.50 poll tax); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) ($10 fine). *Amicus* submits that the core principles of federalism are no trifle. The burdens upon *Amicus'* members and their offices are substantial, ranging up to 20% of their working day.

> Whatever the outer limits of [State] sovereignty may be, one thing is clear: the Federal government may not compel the States to enact *or administer* a federal regulatory program.

112 S.Ct. at 2435 (emphasis added). This Court's explanation is clear that neither legislation nor ownership can be compelled, so that a choice between the two is an impermissible dilemma.[7]

The Ninth Circuit also held that 18 U.S.C. § 922(s) regulates "commerce" and is therefore constitutional. However, *Amicus'* members contend that they are not engaged in commerce when they: (1) individually *decline* to perform background checks; or, (2) officially undertook their functions as sheriffs of the various Wyoming counties without performing such checks. None of this Court's cases hold or even suggest that the state's exercise of its police power with regard to an economic activity which affects interstate commerce is itself an economic activity

---

[7] Amicus submits that to demand that the States resolve a problem is bad enough; to dictate the resolution and order their servants to execute it is worse. Federalism is undermined when Congress "compels state agencies . . . to function as bureaucratic puppets of the Federal government." *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 642 n.29 (1986). *Amicus* believes that at the very core of *New York* is the recognition that Congress cannot "present a simple command to state governments to implement legislation enacted by Congress," 112 S.Ct. at 2428. To the extent forced administration of law differs from forced making of law, it is a more egregious breach of federalism – as the dissenting Ninth Circuit Judge and the Fifth Circuit recognized. *Mack*, 66 F.3d at 1035 (Fernandez, J., dissenting); *Koog*, 1996 WL 131950 at 5.

or species of commercial intercourse subject to regulation by Congress.

Amicus submits that to invoke federal preemption in this context – where the State was declining to regulate or burden commerce – would require that the doctrine be distorted almost beyond recognition. As this Court has previously elaborated:

> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise power through the mechanism of mandating state regulation. The Constitution established Congress as a 'superintending authority over the reciprocal trade' among the States. The Federalist No. 42, . . . by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to state governments.

New York, 112 S.Ct. at 2430-31 (emphasis in original).

Here, *Amicus* WSA members are neither engaging in commerce, nor restricting it, if they decline to perform background checks. The fact that a firearms dealer may be engaging in such commerce is beside the point. *Amicus'* members are not firearms dealers. They are not affecting or burdening interstate commerce; rather, it is solely through the Brady Act that Congress seeks to force them to affect interstate commerce. Amicus submits that such compulsion is beyond Congressional powers.

Despite the Ninth Circuit's obscured distinction, there is no precedential ambiguity here; in its absence, a

court cannot rewrite the statute into constitutional form. *Aptheker v. Secretar*, 378 U.S. 500, 515 (1964). "The intention of Congress is revealed too distinctly to permit us to ignore it because of misgivings as to power. The problem must be faced and answered." *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). The sheriffs of Wyoming, and all others similarly situated who are forced to heed the Brady Act's mandate, therefore, have a compelling need for resolution of the constitutional issues posed by the Petition.

III. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH A DECISION OF THE FIFTH CIRCUIT AND REQUIRES THIS COURT'S INTERVENTION

The Ninth Circuit's opinion upholding the Brady Act directly conflicts with a recent decision of the Fifth Circuit. *Koog v. United States*, ___ F.3d ___, 1996 WL 131950 (1996). In *Koog*, the Fifth Circuit expressly considered and rejected the reasoning of the Ninth Circuit's decision in *Mack*. Further, the Fifth Circuit specifically rejected the Ninth Circuit's characterization of the Brady Act imposition on a CLEO as "minimal," *Koog*, 1996 WL 131950 at 9.

> We do not consider it a minimal interference when a local sheriff or chief of police is offered no choice but to devote purely local manpower and monetary resources to check the backgrounds of countless applicants for handgun purchases.

Id.

After reviewing the Brady Act's requirements of forced administration, the Fifth Circuit found that the Brady Act also violated the political accountability principles underlying this Court's decision in *New York*.

> For citizens that encounter the palpable consequences of this law, Congress is nowhere to be found. Congress does not employ the CLEO, supervise his work or pay his salary; the nameplate of no federal office is on his door. But the diffusion of accountability does not end at this point. Even if the affected citizen is aware that the legislation mandating background checks springs from the national government, and then turns to the Brady Act to determine political accountability, he will find that the CLEO himself is responsible for deciding what is a "reasonable" search. Laying this responsibility on the CLEO's political doorstep permits Congress effectively to shift "the political liability for subsidiary decisions from federal to state officials."

Koog, at 1996 WL 131950 at 8.

The problems created by the current conflict between the federal Circuits has far reaching consequences. *Amicus* sheriffs' responsibilities under the Brady Act will now be further hampered and expose them to increased risk of error because a large jurisdiction within the country is now no longer under a legal duty to comply with the dictates of the Brady Act. In contrast, *Amicus'* members are public officials bound by oath of office and the Supremacy Clause. They have been advised by their respective county attorneys that they are bound to follow the Brady Act unless and until it is held unconstitutional.

Therefore, because of the tremendous impact of the present conflict in the federal Circuits, the Petition for Writ of Certiorari should be granted to determine the constitutionality of 18 U.S.C. § 922(s) and the meaning of this Court's decision in *New York*.

IV. IMPORTANT SEPARATION OF POWERS QUESTIONS ARE PRESENTED BY THE PETITION.

The Constitution diffuses power among the legislative, judicial, and executive branches in order to protect individual liberty. *United States v. Munoz-Florez*, 495 U.S. 385, 394 (1990).[8] The Appointments Clause in Article II, § 2 of the U.S. Constitution protects one aspect of this separation of powers by vesting in the President the power to appoint officers of the United States. This Court has previously held that the Constitution expressly and implicitly vests the power to appoint and control executive officers in the President. *Meyers v. United States*, 272 U.S. 52 (1926); *Bowsher v. Synar*, 478 U.S. 714 (1986).

This Court held in both *Meyers* and *Bowsher*, that executive powers cannot be entrusted to any officer who is subservient to, or who may be controlled by, the Congress. This view is supported by the language of Article II of the Constitution which does not allow for any diminution of "Executive Power" since all, not some, of that

---

[8] "The Framers of the Federal Constitution . . . viewed the principles of separation of powers as the absolutely central guarantee of a just government: 'Recognizing this, the Court has repeatedly adjudicated separation of powers claims brought by people acting in their individual capacities. (citing cases).' " *United States v. Munoz-Florez*, 495 U.S. 385, 394 (1990).

power is vested in the President. While the Constitution does allow Congress to vest the power to appoint inferior executive officers "in the President alone, or in the courts of law, or in the heads of departments," it does not allow Congress itself to appoint executive officers. This is true even though Congress may appoint its own inferior officers to carry out appropriate legislative functions, and it may define the scope of an appointee's jurisdiction. *Buckley v. Valeo*, 424 U.S. 1 (1976).

Like Petitioner, the Chief Law Enforcement Officers of the Wyoming Sheriff's Association have been pressed into federal executive service by the legislative branch through the Brady Act. The functions that the sheriffs are required to perform are clearly executive in nature. The commands of Congress, through the Brady Act, involve the sheriffs in "administration and enforcement of the public law" prohibited in *Buckley* apart from the constitutionally required procedure of Article II. Therefore, the Petition should also be granted to determine whether 18 U.S.C. § 922(s) must be stricken as a violation of the Appointments Clause and the Separation of Powers Doctrine.

CONCLUSION

The Ninth Circuit is profoundly mistaken in its holding that the Brady Act is a minor imposition on the offices of local and state government. The Brady Act represents exactly the type of federal intrusion into state sovereignty prohibited by the Tenth Amendment. Therefore, *Amicus* submits that the Ninth Circuit's constitutionally antithetical opinion represents bad law, has no place in federal jurisprudence, and merits prompt review.

Respectfully submitted,

PAUL M. SEBY*
1400 Glenarm Place, Suite 300
Denver, Colorado 80202
(303) 571-1400

*Counsel of Record
Attorney for Amicus Curiae